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No. 192

In the Supreme Court of the United States

OCTOBER TERM, 1969

MARVIN C. MESCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 407 F. 2d 1290. The opinion of the district court (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1969, and a petition for rehearing was denied on April 11, 1969. The petition for a writ of certiorari was filed on June 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly rejected, after a hearing, petitioner's claim that he was denied the

assistance of counsel because he chose to be represented at his joint trial by an attorney retained and paid by a codefendant, where there is no indication of divided loyalties.

STATEMENT

In the United States District Court for the District of Colorado petitioner and ten others, including several corporate defendants, were convicted of substantive violations of 18 U.S.C. 1341, using the mails to defraud. On appeal the convictions were affirmed. *Mesch* v. *United States,* 407 F. 2d 1286 (C.A. 10). The evidence alleged a sophisticated scheme involving the sale and installation of swimming pools and is summarized in the opinion of the Tenth Circuit on the direct appeal and in the government's Brief in Opposition to the petition for a writ of certiorari to review the affirmance of the convictions. See *Baldwin* v. *United States,* No. 1384, O.T. 1968, certiorari denied, June 23, 1969.[1]

On April 2, 1968, during the pendency of the direct appeals, petitioner filed with the district court a motion to vacate sentence. This motion alleged that at the time of the trial there was a conflict of interest between codefendant Wagner and petitioner, arising from Wagner's alleged breach of an agreement whereby petitioner was to become a stockholder in some of the defendant corporations, and Wagner's failure to return $10,000 that petitioner had paid him. Peti-

[1]Although petitioner did not originally join in that petition, but was named as a nominal respondent under this Court's Rule 21(6), his subsequent application to be added as a party-petitioner was treated by the Clerk as notice, under that Rule, signifying continuing interest.

tioner further alleged that Wagner had paid attorney Salazar to represent all the defendants, including petitioner, with the exception of defendant Cross; that petitioner was unaware of the potential conflicts which can arise from the joint representation of multiple defendants by one attorney; and that the trial court had not inquired into such possibility of prejudice or conflict of interests (R. 36).

The court of appeals, where the case was then pending on direct review, remanded the cause to the district court for certification whether the motion would be granted. A hearing was thereafter conducted on the motion (R. 1). Petitioner, who was the only witness, testified that in December 1965 or January 1966, he had invested $10,000 with Wagner under a written agreement. Petitioner was to get stock in some of the corporations controlled by Wagner, but did not receive the stock or a refund of his money (R. 5–6). After indictment Wagner advised petitioner that Salazar was to be the attorney for all the defendants at the mail fraud trial. Petitioner did not pay Salazar, but was told that Wagner had done so (R. 7). Petitioner did not have any discussion with Salazar before trial in regard to the risks inherent in the representation of multiple defendants by one attorney (R. 7–8). After the arraignment, petitioner testified, he made known to Salazar the conflict of interest between Wagner and himself over the $10,000 and said he would like to sue Wagner. Salazar said he could not file such a suit because it would involve a conflict of interest on his part (R. 9).

In denying the motion to vacate, the district court observed that petitioner had not "demonstrated a single factual situation which occurred prior to or during trial that would support a claim of conflict of interest" in representation during the criminal proceedings (Pet. App. B 12). The trial judge further concluded, on the basis of his assessment of the trial, that "[n]ot a single incident occurred at trial to suggest that even a minor conflict of interest existed between Mesch and his codefendant Wagner or between Mesch and any of the other defendants" (Pet. App. B 16). The appeal from this ruling was submitted along with the direct appeal from the convictions and, on the same day the convictions were affirmed, the court of appeals separately held there had been no denial of the right to counsel (Pet. App. A). The court pertinently noted (Pet. App. A 9):

> Appellant points to no trial incident and our review of the trial record reveals nothing from which it can be inferred that any semblance of prejudice resulted from joint representation. Appellant testified extensively in his own behalf; no conspiracy was charged among the defendants that might suggest the desirability of a trial tactic of dissociation among defendants; and trial counsel is even now recognized by appellant as a "trial advocate of the highest caliber."

ARGUMENT

In the instant case there was no denial of effective assistance of counsel under the Sixth Amendment. Petitioner, "a sophisticated businessman" fully con-

versant with the swimming pool business out of which the mail fraud prosecution arose (Pet. App. B 12–13), freely chose to be represented by counsel admittedly "of the highest caliber". That such counsel was paid by and also represented another defendant at trial does not *per se* demonstrate a conflict of interest warranting a new trial. Common representation is not error absent some showing of possible conflict of interest. *United States* v. *Paz-Sierra*, 367 F. 2d 930 (C.A. 2), certiorari denied, 386 U.S. 935; *Fryar* v. *United States*, 404 F. 2d 1071 (C.A. 10), certiorari denied, June 16, 1969, No. 1491 Misc., O.T. 1968; *United States* v. *Cosentino*, 372 F. 2d 61 (C.A. 7); *United States* v. *Burkeen*, 355 F. 2d 241 (C.A. 6). As both courts below expressly held, not even the slightest conflict or prejudice as a result of the joint representation was shown here. In fact, the district court noted, petitioner "makes no definite assertion of prejudice that resulted from the joint representation" (Pet. App. B 12). Petitioner's testimony at the hearing on the motion to vacate showed only that he had a business deal with codefendant Wagner which turned sour; it failed to show any conflict of interest between Wagner and the petitioner which interfered with counsel's effective representation of petitioner at the mail fraud trial.

Petitioner's claim is essentially like that presented in the petition for a writ of certiorari in the *Fryar* case, *supra*, which also sought review of the Tenth Circuit's refusal to presume prejudice from joint representation in the absence of any hint in the record that counsel's loyalty or effectiveness was affected

thereby. This Court recently denied certiorari in that case, and no different disposition is in order here. As we explained more fully in opposing certiorari in that case, reliance on cases from the District of Columbia Circuit (see instant petition, p. 5) is misplaced.[2] Unlike the cases relied upon, there was no suggestion at trial here of any conflict of interest; nor was the district court in any way insensitive to petitioner's right to fair representation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1969.

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[2] We are supplying counsel for petitioner with a copy of our brief in opposition in *Fryar*.

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